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## THE JEAN MONNET PROGRAM

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Jean Monnet Working Paper 05/06

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**A Theory of WTO Law**

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ISSN 1087-2221  
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**ABSTRACT:** *The creation of the World Trade Organization in 1994 with its streamlined and highly automatic system of dispute settlement has left open the question of whether we can identify a theory of its legal system. This article posits the idea that such a theory can be discerned if we conceive of the WTO Agreement as protecting expectations about trade, facilitating adjustment to realities encountered in trade, and promoting interdependence between economic operators. Each of these purposes is implemented under the WTO Agreement by a specific instrument. In the case of expectations it is collective obligations, in the case of realities it is individual rights, and in the case of interdependence it is a combination of the foregoing two – a *lex specialis*. The tension in this arrangement resolves itself in the form of a dialectic between WTO and domestic law. The article goes on to posit some consequences of the theory for the broader corpus of public international law.*

# A THEORY OF WTO LAW

By Chi Carmody<sup>1</sup>

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## 1. INTRODUCTION

The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)<sup>2</sup> is one of the centerpieces of public international law today, yet a decade after its entry into force we continue to lack a coherent theory for it. In short, *why* is the treaty as it is?

To put this question in context, it is useful to remember that we have a generally accepted *economic* theory of the WTO Agreement based on the exchange of trade concessions.<sup>3</sup> We also have a generally accepted *political* theory of the WTO Agreement based upon the Kantian idea of a liberal peace.<sup>4</sup> Nevertheless, we continue to lack a *legal* theory of the WTO Agreement, by which I mean a system of ideas to explain the treaty as a matter of law and justice.<sup>5</sup> The prevailing situation has led Thomas Cottier and Matthias Oesch to observe recently that “the absence of a longstanding legal theory or tradition of international trade regulation explains why even basic questions are still in the open.”<sup>6</sup>

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<sup>2</sup> 33 I.L.M. 1125 (1994).

<sup>3</sup> MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 2-3, 37 (2<sup>nd</sup> ed.) (2001).

<sup>4</sup> Kant did not make the argument that democracies will not fight, only that they are not disposed to fight each other. Later theorists recognized the same tendency among countries that conduct trade with each other. See Padideh Ala'i et al. (eds), *TRADE AS GUARANTOR OF PEACE, LIBERTY AND SECURITY? CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES* vii (2006);

<sup>5</sup> Law is defined as “the aggregate of legislation, judicial precedents, and accepted legal principles” BLACK'S LAW DICTIONARY (8<sup>th</sup> ed.) 900 (2004); Justice is defined as “the fair and proper administration of law”, *ibid.*, 881.

<sup>6</sup> THOMAS COTTIER & MATTIAS OESCH, *INTERNATIONAL TRADE REGULATION: LAW AND POLICY IN THE EUROPEAN UNION AND SWITZERLAND* 33, 47 (2005). They observe additionally that “Theoretical analysis of the exact contents and confines of the core legal principles governing the current multilateral trading system ... are in full swing in dialogue with the case law and far from settled, despite the fact that these concepts have been in existence for a very long time. An academic body of legal theory of trade regulation is only beginning to be built, dealing with basic structures, institutions and regulatory approaches.” See also Ernst-Ulrich Petersmann, *International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order* in R. ST.J. MACDONALD & D.M. JOHNSTON (eds), *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 227-259

In other work I have pointed out that the WTO Agreement can be understood as aimed primarily at the protection of expectations concerning trade, but also, and secondarily, at facilitating adjustment to certain realities encountered in the course of trade. The interaction of these two purposes – one dominant, the other subordinate – achieves a third purpose over time, which is the promotion of interdependence.<sup>7</sup>

In this article I want to go on to examine how each of these purposes is implemented by a specific instrument. In the case of expectations it is *collective obligations*, in the case of realities it is *individual rights*, and in the case of interdependence it is a combination of the other two, a *lex specialis*. The ongoing tension in this arrangement resolves itself in a dialectic between the collective and the individual, or in WTO terms, between international and domestic law.

This identification is important because it helps us to get more directly at a theory of WTO law. One of the consequences of the prevailing theoretic vacuum is that the WTO Agreement has to be discussed in either highly specific or very general terms. There is little in-between. Thus, there have been many articles on this or that WTO case, on the trend in a series of cases, or on particular WTO provisions. Likewise, the treaty has been assessed from a variety of economic, political and international relations perspectives. Much of this work is insightful, but it has tended to obscure the framework on which the treaty is based: *rights and obligations*. Rights and obligations are the basis of any system of law, including international law, and so it seems entirely appropriate to focus on their relationship under the WTO Agreement as a means of more fully and amply detailing the treaty's legal theory.

The WTO Agreement as a body of law otherwise presents an intimidating face. Claus-Dieter Ehlermann has observed that “there seems to be no – or at least little – structure and overall architecture” to WTO law.<sup>8</sup> An approach focused on rights and obligations permits us to see this, however, by emphasizing the natural components that the law is made up of and affording some sense of how they might work together. In most instances a right infers a corresponding obligation, or so the law generally teaches us.<sup>9</sup> With that preliminary relationship in mind, we are better able to measure the peculiarities of WTO law and to assess them against a commonly held standard.

A focus on rights and obligations in WTO law is also promising because references to the term “rights and obligations” appear frequently in WTO jurisprudence, but rarely – if ever – has the

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(1983). Work of other commentators is hardly more sure. John Jackson has described the WTO Agreement as “a very complex mix of economic and governmental policies, political constraints, and above all an intricate set of constraints imposed by a variety of “rules” or legal norms in a particular institutional setting.” JOHN JACKSON, THE WORLD TRADING SYSTEM 339 (2<sup>nd</sup> ed.)(1998). Raj Bhala has described GATT as “venerable and inscrutable, inspiring and frustrating, grand and picayune.” RAJ BHALA, MODERN GATT LAW vii (2005). For attempts at deriving a theory of international trade see FRANK J. GARCIA, TRADE, INEQUALITY AND JUSTICE: TOWARDS A LIBERAL THEORY OF JUST TRADE (2003); see also RAJ BHALA, TRADE, DEVELOPMENT AND SOCIAL JUSTICE (2003).

<sup>7</sup> Chios Carmody, *WTO Obligations as Collective* 17:2 EUR. J. INT'L L. 419 (2006).

<sup>8</sup> Claus-Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court”* in FEDERICO ORTINO & ERNST-ULRICH PETERSMANN (eds.), THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 499, 521 (2004).

<sup>9</sup> Williamson refers to this idea as “the correlativity of rights and duties”, which was noted by early thinkers like Samuel Pufendorf. See WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 25 (2004).

term been subjected to serious scrutiny.<sup>10</sup> Instead, many commentators have been preoccupied with larger, macro-type issues – the WTO and democracy, the WTO and development – and on the whole have neglected to examine this vitally important aspect of WTO law. The arrangement of rights and obligations, the contrapuntal stress they create, and the way that they simultaneously “constrain and enable”<sup>11</sup> state action all afford us deeper insight into why things are as they are. We can appreciate their mechanism. The face of the law is no longer so daunting.

International law has traditionally paid more attention to obligations than to rights. This remains true today even in key statements of international law such as the International Law Commission’s Articles on State Responsibility.<sup>12</sup> That emphasis is no doubt due to the greater specificity and precision inherent in defining what *must* be done than in the relatively open-ended task of defining what *may* be done.

States may assume obligations that are either conventional or customary in origin, or that inhere by virtue of being norms from which no derogation is permitted (*jus cogens*). In addition, they may assume these obligations to one other country bilaterally, to the international community as a whole (*erga omnes*) or to a subset thereof (*erga omnes partes*), as well as to individuals, groups and affiliations.<sup>13</sup> Once assumed, the obligations may be either reciprocal, interdependent or integral depending upon the consequences arising from their breach.<sup>14</sup>

The position with respect to rights is somewhat different. The classical conception of state rights

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<sup>10</sup> A sign of the difficulty of assessing what the term means is contained in the Appellate Body’s admission in *Chile – Alcoholic Beverages*, WT/DS87/AB/R, para. 87 (13 Dec. 1999) that “[I]n these circumstances, we do not consider that the Panel has added to the rights or obligations of any Member of the WTO. Moreover, we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member ... if its conclusions reflected a correct interpretation and application of provisions...”

<sup>11</sup> Jutta Brunnée and Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, COLUM. J. TRANSNATIONAL L. 19, 31 (2000).

<sup>12</sup> The International Law Commission’s Articles on State Responsibility, unanimously endorsed by the U.N. General Assembly in A/RES/56/83 (Dec. 12, 2001), reprinted in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002).

<sup>13</sup> This is recognized in Arts. 38(1)(a)-(b) of the Statute of the International Court of Justice and by virtue of the *Barcelona Traction Case* [1970], I.C.J. Rep. 4. Article 33(1) of the International Law Commission’s Articles on State Responsibility recognize that obligations may be owed either bilaterally or collectively, and that in the latter case, collective obligations may be owed to the international community as a whole or to a subset thereof. Furthermore, Art. 33(2) makes clear that the ASR are without prejudice to “any right ... which may accrue directly to any person or entity other than a State.”

<sup>14</sup> The distinction between reciprocal, interdependent and collective obligations originates in the work of Gerald Fitzmaurice on the law of treaties in the 1950s. Fitzmaurice theorized that bilateral treaty obligations would be bilateral, but multilateral treaties could be composed of obligations that were either bilateral (or what he termed “reciprocal”), interdependent (that is, conditional upon the performance of other parties) or integral (that is, unconditional). His ideas served as the basis for the scheme of the Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969) and influenced the drafting of the ASR, which make distinctions based on these classifications, although it is entirely possible today that a single treaty might involve several different categories of obligation. The nature of the obligation will depend upon the nature of primary rule that the obligation emanates from as well as the circumstances of its breach. See G. Fitzmaurice, ‘Third Report on the Law of Treaties’, UN Doc. A/CN.4/115 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1958 II) at 20; JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 233 (2002).

is that states are free to do what is not otherwise prohibited,<sup>15</sup> although this has changed in recent years with the proliferation of international law, its basis in custom, and the need to persistently object to customary developments that a country seeks exemption from. The question most often raised with respect to rights is who has the capacity to invoke them.<sup>16</sup>

My principal point is that while we might consider the presumptive relationship between rights and obligations to be one of correspondence – that is, each right is taken to be matched by a single, offsetting obligation – two features operate to modify this relationship in WTO law. First, the Most Favoured Nation (MFN) clause causes obligations owed under the treaty to become obligations owed to the *entire* WTO membership. This converts them into collective obligations. Second, these collective obligations have a hybrid quality, being reciprocal in a few instances but interdependent and integral in most others. Such dualism helps to reinforce the aim of promoting interdependence.

The character of WTO obligations tends to restrict the nature of rights. Most are very limited. They do not possess the amplitude we normally expect of rights, a quality which probably accounts for perceptions about the relative intensity of WTO law.<sup>17</sup>

Over time the arrangement of rights and obligations produces a range of results. The results may be seemingly inconclusive, as in the case of the *Hormones* dispute<sup>18</sup>, or involve a limited form of accord, as in Sri Lanka and the EC's recent efforts to establish a new international standard for chemical residues in cinnamon<sup>19</sup>, or involve broad-based agreement, as in the Doha Declaration

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<sup>15</sup> The classic statement of international law is taken from *The Case of the S.S. Lotus*, P.C.I.J. Ser. A, No. 10 at 15 (1927) where the PCIJ stated: "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules ..."

<sup>16</sup> See ASR Arts. 42 (invocation of responsibility by an injured State) and 48 (invocation of responsibility by a State other than an injured State). The ASR Commentary observes the overlap between these two categories: "Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is "injured" in the sense of article 42, and other States are entitled to invoke responsibility under article 48." JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 255 (2002).

<sup>17</sup> Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court"* in FEDERICO ORTINO & ERNST-ULRICH PETERSMANN (eds.), *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003* 499, 522-23 (2004).

<sup>18</sup> In 1996 the United States and Canada challenged a ban by the EC on imports of hormone-treated meat and meat products. The challenge centered on the alleged failure of the EC to conduct a risk assessment prior to instituting the ban. The U.S. and Canadian positions were accepted by a WTO panel and the Appellate Body, and in July 1999 both the United States and Canada were authorized to retaliate against the ban. Since the imposition of retaliation, the EC has continued to keep its market closed to imports of hormone-treated meat, but has allegedly removed the fact of WTO inconsistency by implementing new measures and invoking a precautionary approach to regulation. This resulted in a challenge by the EC in November 1994 to the continuing U.S. and Canadian retaliation. Press reports indicate that the EC challenge may be successful, something which has prompted fresh negotiations among the countries concerned. See *U.S., EU Look to Resolve Beef Fight by Increasing Hormone-Free TRQ*, *INSIDE U.S. TRADE* (Oct. 13, 2006).

<sup>19</sup> A WTO press release noted that the EC maintained a ban on sulphur dioxide in cinnamon, even though it allowed minimal levels in other spices. "The issue arose partly because Codex Alimentarius, the WHO-FAO body where countries negotiate standards for food safety, did not have a standard for SO<sup>2</sup> residues in cinnamon. In July [2006], Codex approved a new standard ... and Sri Lanka praised the EU for "excellent cooperation" in finding a solution, partly through administrative means. In February [2006] the EU offered to help Sri Lanka apply for approval for a standard and to seek support from the European Parliament and the [EU] member states." See Sri Lankan

on TRIPS and Public Health.<sup>20</sup> What all of these outcomes have in common is that they represent a substantive balance. The balance is not singular and static, but rather something that is in constant flux. The WTO Appellate Body demonstrated its awareness of this idea in *U.S. – Shrimp* when it observed that “[t]he location of the line of equilibrium is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.”<sup>21</sup>

While the Appellate Body’s statement in *U.S. – Shrimp* was made in the context of a discussion about competing *rights*, I posit in this article that it is emblematic of the tension between rights and obligations under the treaty generally. After all, rights are the obverse of obligations, and we can readily see how the interpretation of one could give greater or lesser extent to the other.

My thinking has much in common with the work of Jürgen Habermas, who has posited that “the pragmatic function of speech is to bring interlocutors to a shared understanding and to establish intersubjective consensus.”<sup>22</sup> If we conceive of debate about rights and obligations in WTO law as a form of “speech”, and if this speech acquires a certain social and moral use that Habermas refers to as “discourse”, then it is easy to see how the function of discourse under the WTO Agreement “is to renew or repair a failed consensus and to re-establish the rational basis of the social order.” In this respect, it is not at all surprising that consensus is the norm in WTO decision-making.<sup>23</sup>

From these introductory observations several things become apparent. First, the arrangement of rights and obligations under the WTO Agreement is key to understanding the law’s profile, or in other words, why it “looks” the peculiar way it does. Second, WTO dispute settlement is not the win-lose proposition it is often portrayed as, but rather part of a quest for solutions to conflicting interests. Third, in the search for a coherent account of WTO law something else gradually becomes discernible: the idea of WTO law as a unified whole.

A fourth point is that the relationship between rights and obligations in WTO law is present in a more diffuse way in public international law. A pattern of discourse is conducted there too, and to the extent that the integrated nature of law under the WTO Agreement accentuates this tendency, the theory that emerges from it can be said to provide a way of understanding the recurrent patterns of WTO law as well as their more distant reflection in international law.

This article is therefore arranged in six parts. Following the Introduction, Part Two deals with the

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cinnamon’s future brightens, SPS Committee told (Oct. 11-12, 2006), available at [www.wto.org](http://www.wto.org); see also *Sulphur Dioxide in Cinnamon*, G/SPS/GEN/716 (July 25, 2006).

<sup>20</sup> See *WTO Declaration on TRIPS and Public Health*, WT/MIN(01)/DEC/2 (20 Nov. 2001) and also *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (2 Sept. 2003). For a comprehensive account of the development of these documents see Haochen Sun, *The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health*, 15 EUR. J. INT’L L. 123 (Feb. 2004).

<sup>21</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R para. 159 (Oct. 12, 1998).

<sup>22</sup> JAMES GORDON FINLAYSON, *HABERMAS: A VERY SHORT INTRODUCTION* 33 (2005).

<sup>23</sup> See WTO Agreement Art. 9.1 (“The WTO shall continue the practice of decision-making by consensus followed under GATT 1947” with consensus defined as the situation where “if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”).

nature of theory and what can be expected from a theory of WTO law. Part Three sets out the theory, emphasizing the contrasting yet complementary roles that rights and obligations play together in the WTO's legal order. The aim is not to identify any *single* relationship as much as it is to uncover the range of potential relationships between them. Part Four goes on to examine all of these ideas as an integrated structure, or in other words, as a "system". Part Five explores the implications of a theory of WTO law for the broader corpus of public international law. Part Six offers some concluding thoughts about a theory of WTO law.

## 2. THE CONCEPT OF A THEORY

The task of identifying a theory of WTO law naturally raises the issue of what a theory is and how it differs from other concepts about law. A theory has been defined as "a system of ideas or statements explaining something, especially as distinguished from the practice of it"<sup>24</sup>, and to the extent that this article presents a system of ideas about WTO law, then we have a theory, or at least the beginnings of one.

Still, the term "theory" implies a degree of generality and depth, and so what I will do here is to present material from a number of sources to illustrate the range of my ideas. I agree with Habermas that a criterion of "good social theory is the degree to which it can engage with its antecedents and competitors, explaining and preserving their successes, while remedying their defects"<sup>25</sup>, but there are other qualities that a viable theory will exhibit as well.

One is coherence. A theory implies a degree of connection between its constituent ideas. In other words they "fit" well together. I have already outlined how the theory I put forward accounts for the connections observed between certain features of WTO law. Other theories about the WTO Agreement do not do this.

Another quality of theory is reflexivity. A viable theory should not only be able to identify principal ideas, but also to describe the way in which they interact together. Again, other theories do not do this by, for example, explaining the link between equality and dispute settlement, or the abiding concern with conformity. The theory put forward here explains these components by stressing their individual insufficiency and their collective complementarity. The final picture is not simply a static view of the treaty's various parts, but rather a dynamic understanding of their interactive whole.

Third, a theory implies a degree of exclusivity, or in other words, the quality of self-sufficiency about its explanation of observed phenomena. The theory does so principally by forwarding an explanation of WTO law in three modes that, as I have already pointed out, are implemented by specific instruments. Together, they can account for much of what happens in the operation of the treaty.

As mentioned, there are many theories about the WTO Agreement, but theories that have most dominated thinking about WTO law recently have conceived of the treaty as either a contract or a constitution. Perhaps the most authoritative reference to contractualism is the Appellate Body's

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<sup>24</sup> THE NEW SHORTER OXFORD DICTIONARY 3274 (4<sup>th</sup> ed.) (1993).

<sup>25</sup> JAMES GORDON FINLAYSON, HABERMAS: A VERY SHORT INTRODUCTION 19 (2005).

statement in *Japan – Alcoholic Beverages*<sup>26</sup> that:

The *WTO Agreement* is a treaty -- the international equivalent of a *contract*. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.<sup>27</sup>

The Appellate Body's statement emphasizes the minimal nature of the treaty's engagement. The WTO Agreement is a "contract" and sovereignty is limited "according to the commitments" countries have made. Not surprisingly, WTO member countries have found this conception of the treaty attractive and have referred to it on a number of occasions.<sup>28</sup> Accordingly, WTO obligations are bilateral and conditioned.

However, a second theoretical perspective sees the treaty as constitutional. For instance, John Jackson has referred to the WTO Agreement as a "constitution" and Gail Evans has gone on to hypothesize that "the WTO may be explained as a trade constitution having the capacity to provide for the universalization of norms of substantive law."<sup>29</sup> Accordingly, obligations are more collective in nature, and thus more uniform and absolute.

Polarity about the true nature of WTO law is useful because it serves to highlight the point of difference along lines we already know. Contracts and constitutions are familiar. They are things we can easily wrap our minds around. At the same time, they can be criticized for presenting a false duality because they overshadow the fact that both contracts and constitutions share a conceptual continuum. It is well-known that they have similar features and are occasionally

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<sup>26</sup> *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R p. 14 (Oct. 4, 1996) [emphasis added].

<sup>27</sup> *Ibid.*

<sup>28</sup> See statement by Brazil in WT/DS69/AB/R, para. 15 (describing the WTO Agreement as "an international treaty laying down *contractual* obligations and not *erga omnes* obligations."); Argentina in WT/DSB/M/42, pp. 14 (referring to SPS obligations as "*contractual* international obligations"). The contractual optic was also evident in *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004) [the Sutherland Report]. See for instance "*contractual* requirements of membership" (para. 3), "*the contractual* detail of the WTO" (para. 200), "an institution founded on negotiated *contractual* commitments among governments" (para. 206), "countries should have *contractual* entitlement to capacity building support" (para. 306), "the WTO, in future, should contain provisions for a *contractual* right" (para. 311). For commentators supportive of this view see Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14:5 E.J.I.L. 907 (2003) p. 938 ("Put differently, the values, aspirations and priorities of close to 150 WTO Members remain far too diverse for WTO norms to be streamlined into constitutional-type obligations ..."). Similarly, Petros Mavroidis has referred to the WTO Agreement as an "incomplete contract". In his view negotiators were "well aware that various [governmental] policies ... might have an impact on trade, and that is why they decided to discipline the exercise of these policies. They did not, however, proceed to enumerate every one of them, nor did they provide specific disciplines for each." PETROS MAVROIDIS, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY* (2005).

<sup>29</sup> See JOHN JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998); GAIL EVANS, *LAWMAKING UNDER THE TRADE CONSTITUTION* 44 (1999); DEBORAH CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY AND COMMUNITY* (2005). For a critical appraisal of the constitutional view see Jeffrey Dunoff, *Constitutional Conceits: The WTO's Constitution and the Discipline of International Law*, 17:3 E.J.I.L. 647 (2006).

linked to one another.<sup>30</sup> Both involve limits to power, and both describe a relationship. Consequently, such terms have to be used with care. They may be convenient as descriptors, but an accurate theoretic model based upon them can only be derived from independent examination of what the treaty actually involves.

This is behind my insistence on an examination of rights and obligations under the WTO Agreement. It is rights and obligations that set out the parties' commitments under the treaty, and it is likewise rights and obligations that serve as the basis for the treaty's theory. My analysis assumes a dyadic form that divides the two instruments into anti-posing elements in order to highlight their contrast. Thus, I show how the plenary extent of obligations is mirrored by the restricted extent of rights, and how this fundamental division is replicated in juridical, temporal and kinetic dimensions. Each of the categories I am referring to here sets one element against its opposite, and less directly, against all of the other elements in the matrix. The outcome is a much richer insight into the treaty's composition than any casual reference to "rights and obligations" might provide.

I go on to suggest, however, that a purely dyadic conception of WTO law is incomplete. This is because over time we have to see these instruments working *together*, creating something that is, in effect, triadic. Rights and obligations interact with each other, but they do not constitute the entirety of the law. The law itself is composed of many additional elements – fairness, good faith and the like - that must be applied in order to achieve justice.<sup>31</sup> Once all of this is understood, we will have a preliminary conception of what WTO law *is*.

Such a theory can be put to good use. For virtually the whole of its short history the WTO Agreement has been the subject of intense criticism, particularly from those who claim that it is unjust.<sup>32</sup> With insight into what WTO law *is*, a theory allows us to better envisage what the law *should be*.

The taxonomy I present is broadly consistent with common descriptions of a theory of law.<sup>33</sup> Hans Kelsen described a theory of law as furnishing:

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<sup>30</sup> Ian McNeil, *The Many Futures of Contracts*, 47 SO. CAL. L.R. 627 (1975).

<sup>31</sup> This point was originally made by Edmund Burke, who recognized that rights and their jural correlatives, obligations, must be appreciated in the greater context of the legal and social environment in which they operate: WILLIAM A. EDMUNDSON, *AN INTRODUCTION TO RIGHTS*, 43 (2004).

<sup>32</sup> For example, the WTO is described as a 'medieval institution' more akin to the Roman Catholic Church in the Middle Ages than a modern legal institution. Decisions remain largely within the control of a small number of powerful Western states, and ... only states with access to the informal talks ... have a strong influence on outcomes." DEBORAH CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY AND COMMUNITY* 14 (2005); "Good international rules do not create automatic benefits for human development, but they can facilitate policies that are good for the poor. Conversely, bad rules can outlaw such policies. Many of the rules enshrined in the WTO fall into the latter category. They threaten to marginalize developing countries and the world's poorest people within an already unequal global trading system." Oxfam, *RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALIZATION, AND THE FIGHT AGAINST POVERTY* 207 (2002).

<sup>33</sup> A dictionary definition of a theory of law is "the legal premise as set of principles on which a case rests." BLACK'S LAW DICTIONARY (8<sup>th</sup> ed.) 881 (2004). That definition expresses the idea of a theory developed in a specific case. Extrapolating beyond this, we might describe the theory of law in a legal system generally as the principles on which such a system rests and the pattern of their interaction. For further definition see R. St.J. Macdonald & Douglas M. Johnston, *International Legal Theory: New Frontiers of the Discipline* in R. ST.J. MACDONALD & D.M. JOHNSTON (eds), *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 1 (1983).

... the fundamental concepts by which the positive law of a definite legal community can be described. The subject matter of a general theory of law is the legal norms, their elements, their interaction, the legal order as a whole, its structure, the relationship between different legal orders, and, finally, the unity of the law in the plurality of positive legal orders.<sup>34</sup>

For Kelsen, a theory of law was primarily “a structural analysis of positive law” rather than a “psychological or economic explanation of its conditions, or a moral or political evaluation of its ends.”<sup>35</sup> Similarly, what I present here can be thought of as an attempt to describe the law’s elements and function.

Kelsen’s words are also important because they hint at a danger in setting out a theory of law: this is the danger of trying to do too much. Developing a theory of WTO law requires the assimilation and organization of a vast amount of material. It is a complex undertaking. Unfortunately, it is also one that can succumb to a totalizing ambition. There is the inevitable - and very human - tendency to try to explain *everything* according to the theory, and to hide, or at least downplay, those things that cannot be so explained. For this reason, we have to focus initially on what the law *is*.

Generally speaking, we might assume that the WTO Agreement is about trade. After all, the origins of the WTO Agreement lie in GATT, the General Agreement on Tariffs and *Trade* of 1947, which was later reformulated and expanded to become the General Agreement on Tariffs and *Trade* 1994, now part of the WTO Agreement. But as I will explain, the principal concern of the treaty is with something much more extensive than trade alone.

At base, the point I seek to make emphasizes a difference in regulatory perspective. The treaty’s obligations do not operate *directly* to require specific quantities of trade as much as *indirectly* to maintain *conditions that promote trade*.<sup>36</sup> This changes the optic. To say that the treaty is about “trade” is to adopt a frame of reference in the here and the now. It is to conceive of the treaty’s chief purpose as being to protect individual transactions taking place in the present, or perhaps more accurately, in the immediate past, since trade cannot be accurately quantified unless it has already been conducted. On the other hand, to say that the treaty protects collective obligations concerning trade comes at matters a little more generally. It abstracts them and renders them timeless. The treaty is no longer about trade *per se*. Rather, it is about trade and all that trade depends upon, including, most vitally, the *freedom* to trade.<sup>37</sup>

This point was confirmed by the panel in *United States – Section 301*.<sup>38</sup> The issue there was the

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<sup>34</sup> HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* xiii (1949).

<sup>35</sup> *Ibid.*, xiii-xiv (1949).

<sup>36</sup> “It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.” *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.78 (Dec. 22, 1999).

<sup>37</sup> “The purpose of many [GATT/WTO] disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.” *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.73 (Dec. 22, 1999).

<sup>38</sup> *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (22 Dec. 22, 1999).

consistency of certain U.S. trade remedy legislation with the WTO Agreement. The complaint asserted that s. 304 of the U.S. Trade Act *required* the U.S. Trade Representative to determine whether another WTO member denied U.S. rights under the WTO Agreement irrespective of dispute settlement timelines. The panel disagreed and decided instead that the Trade Representative had the *discretion* to make such a determination. However, the panel went on to examine whether there remained a *risk* to private economic operators that the U.S. would invoke its discretionary law in a WTO-inconsistent manner. The panel concluded that while there was such a risk, it was not a real one due to official assurances that the U.S. would never do so.<sup>39</sup> The decision emphasizes how the security and predictability afforded under the treaty are a vital part of its greater purpose, and how they together contribute to what is referred to in the preamble of the U.N. Charter as “life in larger freedom”.<sup>40</sup>

Of course, the danger of founding a theory of law on an abstract concept such as the freedom to trade is potential confusion. Trade and the freedom to trade are closely related ideas, and when mixed up with the parade of ongoing events in the WTO, they make it hard to identify a theory of WTO law. We have to think deeply and carefully.

In this respect what I present in this article can be thought of as a meta theory, from the Greek *meta*, or afterwards, meaning that which is of a more fundamental character and which subsists after all is said and done. Such a theory requires us to conceive of matters broadly. We have to assess many things, keeping one eye on the particular and the other eye on the general, and needless to say, that is hard to do. At some point we must go beyond positive law and enter into the realm of what can only be described as legal anthropology. The real value of the exercise is not the ability to determine what this or that case says, but to look at the whole of the treaty and discern its “overall scheme”.<sup>41</sup>

### 3. A THEORY OF WTO LAW

A theory is a system of ideas, and so it seems only reasonable that in order to identify a theory of WTO law, we have to identify its principal ideas.

#### a. *Protecting Expectations: A Law of Obligations*

The starting point of a theory of WTO law is the realization that the principal aim of the WTO Agreement is the protection of expectations. An example is a concession by the United States to grant a certain tariff on textiles. The tariff is not about textile imports *today*. Rather, it is a promise by the U.S. government to treat textile imports in a certain way *in the future*. That promise gives security to textile producers and exporters in foreign countries that their goods will encounter a predictable kind of treatment when entering the U.S. It therefore serves as a basis for

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<sup>39</sup> “Accordingly, we find these statements by the U.S. express the unambiguous and official position of the U.S. representing, in a manner that can be relied upon by all Members, an undertaking that the discretion of the USTR has been limited so as to prevent a determination of inconsistency before exhaustion of DSU proceedings.” *Ibid.*, para. 7.125.

<sup>40</sup> The preamble of the U.N. Charter states “We the peoples of the United Nations determined ... to promote social progress and better standards of *life in larger freedom* ...”

<sup>41</sup> “The greater our knowledge, the more obscure the overall scheme.” CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* 89 (1962).

upstream decisions about investment, production and exports.<sup>42</sup> Textile exporters abroad will know the regulatory barriers they will face and be able to plan their operations accordingly. They may decide to invest in certain machinery, or use certain inputs, or locate their manufacturing in certain locations. Whatever the outcome, many decisions will turn on the expectations created by the U.S. tariff.

This point was amply recognized in GATT jurisprudence. In the *Brazilian Internal Taxes* case of 1949, for example, the working party examining the complaint concluded that France did not need to demonstrate any trade effect of the Brazilian measure at issue to find a violation of the treaty since “potentialities” concerning trade were also covered. In 1987 the panel on *Japan – Alcoholic Beverages*<sup>43</sup> made the same point:

Since it has been recognized in GATT practice that Article III:2 protects expectations on the competitive relationship between imported and domestic products rather than expectations on trade volumes ... the Panel did not consider it necessary to examine the quantitative trade effects of this considerably different taxation ...<sup>44</sup>

Thus, the treaty protects expectations about “the competitive relationship between imported and domestic products”, not expectations about trade *per se*.

The distinction was carried over into the WTO Agreement of 1994, where dispute settlement panels and the Appellate Body have struggled to define the exact role of expectations in the treaty. In *India – Patent Protection*<sup>45</sup>, for example, the panel concluded that the legitimate expectations of India’s trading partners could be taken into account in interpreting India’s compliance with the TRIPS Agreement, a position which was later overruled by the Appellate Body. The Appellate Body held instead that “[t]he legitimate expectations of the parties to a treaty are reflected *in the language of the treaty itself*.”<sup>46</sup> It went on to suggest that the assessment of expectations must be conducted with the collective membership of the WTO in mind.

These observations are of critical importance to a theory of WTO law. This is because in the typical relationship under international law one country exchanges obligations with another. The resulting obligations - and the expectations that arise from them – could be thought of as bilateral.<sup>47</sup> However, under the WTO Agreement things are different. *Many* countries come to

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<sup>42</sup> Warrick Smith & Mary Hallward-Driemeier, *Understanding the Investment Climate*, FINANCE & DEVELOPMENT 40 (March 2005).

<sup>43</sup> *Japan – Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, B.I.S.D. 34<sup>th</sup> Supp. 83 (10 Nov. 1987).

<sup>44</sup> *Ibid.*, para. 5.11.

<sup>45</sup> WT/DS50/R (5 Sept. 1997).

<sup>46</sup> WT/DS50/AB/R, para. 45 (19 Dec. 1997).

<sup>47</sup> The presumption is used here for illustrative purposes only. The Commentary to ASR Art. 33(1) indicates that there is *no* presumption of a specific relationship between rights and obligations in international law. Instead, the determination is a contextual one: “identifying the State or States towards which the responsible State’s obligations in Part Two exist *depends both on the primary rule establishing the obligation that was breached and on the circumstances of the breach*.” For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a

rely upon the obligations undertaken by *one* country and collective expectations result. Properly speaking then, WTO commitments are obligations *erga omnes partes*.

The multilateralizing mechanism is the General Most-Favoured-Nation Clause (MFN) of GATT Art. I:1, which states:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

The wording of the MFN clause makes clear that the obligation owed to one country “immediately and unconditionally” becomes an obligation owed to *all* countries.

Such a reconfiguration has important consequences for the structure of WTO law. To start with, it tends to stress *obligation*. The idea of a generalized obligation is something encountered in a number of legal traditions, most notably in the Hindu notion of *dharma*.<sup>48</sup> Likewise in WTO law, the sense of duty upon member countries in the treaty system is all-pervasive. The law is more likely to be perceived as a body of obligations than as a balance of rights *and* obligations.

A second point is that the generality of obligations influences the kind of justice available. Under the WTO Dispute Settlement Understanding (DSU) countries have the right to take each other before panels where they assert that a national law violates the WTO Agreement. If the panel or the Appellate Body agrees with the claim, a recommendation can be made that the defendant bring its laws “into conformity” with the treaty. There is no automatic requirement of compensation. Instead, the defendant is left to modify its law, in many cases by withdrawal or amendment.

A number of commentators have been critical of this framework for dispute settlement as insufficient, but the traditional response has been one of diplomatic convenience.<sup>49</sup> This explanation does not emphasize the interaction of the treaty’s various parts – expectations, MFN,

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single neighbouring State. Evidently the gravity of the breach may also affect the scope of the obligations of cessation and reparation.”

<sup>48</sup> *Dharma* is difficult to define, but it has always been closely associated with the idea of duty. In traditional Hindu society individuals possess a *dharma*, or duty, and are charged with upholding it for the greater good of society. All of life is thus suffused with obligation: to one’s kin, to one’s associates, and to the wider forces of the cosmos. See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 262ff (2000).

<sup>49</sup> The idea is that it would be too difficult to disaggregate protective or discriminatory from other effects in the international trading system, a system which is by definition always changing: see *United States – Taxes on Petroleum and Certain Imported Substances*, B.I.S.D. 34<sup>th</sup> Supp. 136, para. 5.1.9 (adopted June 17, 1987).

withdrawal and so forth - as much as it does the fact that the DSU codified pre-existing GATT dispute settlement, which evolved from “techniques of the diplomat’s jurisprudence”.<sup>50</sup>

A theory of WTO law sees matters differently. It recognizes that the system’s principal concern is not with individual expectations per se, but about how those expectations are distributed among the WTO membership as a whole. The prevailing model is therefore one of *distributive justice*.<sup>51</sup> Distributive justice works to re-establish the arrangement of expectations according to the applicable metric of distribution, which in the case of the WTO Agreement is the equality mandated by MFN. When this can be done consensually, with the agreement of all concerned, then the system is taken to work justly.<sup>52</sup>

#### b. *Facilitating Adjustment: A Law of Rights*

I have described WTO law as a law of obligations, something which is accurate as a preliminary description. This is because countries assume obligations towards other countries under the treaty, and these are extended to all WTO members by virtue of MFN.

Still, if we examine the treaty closely it is also possible to identify something else that happens. Rules exist under the WTO Agreement that allow governments to respond to certain realities arising in the course of trade. By realities I mean the world as it is *actually encountered* versus the way it is *prospectively perceived*. The law in this mode is more evidently a regime of *rights*.

This point was made by the panel in *Turkey – Textiles*, where the issue was whether Turkey had the *right* to adopt certain import restrictions on textiles and clothing prior to entering into a customs union with the EC. Turkey's argument was that it could adopt the EC's restrictions without the need for renegotiation with third countries because the restrictions were already part of the EC's WTO commitment. The panel observed:

The WTO system of rights and obligations provides, in certain instances, flexibility to meet the specific circumstances of Members. For instance, the ATC

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<sup>50</sup> ROBERT HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 30 (1990).

<sup>51</sup> The nature of justice was considered two millennia ago by Aristotle, who identified two types of justice: *corrective* and *distributive*. *Corrective justice* applies to private interests and plays a rectificatory role in transactions. Thus, when a person is wrongly deprived of their property they are entitled to have it returned or to be compensated. The implicit metric is equality: you get what you’ve lost. *Distributive justice*, by comparison, applies to the distribution of public interests such as “honour or money or other things that have to be shared among members of the political community.” It presupposes some socially agreed means of allotment. Consequently, the implicit metric is proportionate: you get what you’re entitled to. See ARISTOTLE, *NICHOMACHEAN ETHICS* (R. Crisp ed. 2000) 85. See also NICHOLAS RESCHER, *FAIRNESS: THE THEORY AND PRACTICE OF DISTRIBUTIVE JUSTICE* (2002).

<sup>52</sup> This is undoubtedly behind the stated preference in DSU Art. 3.7 for “a solution that is *mutually acceptable* to the parties ... and consistent with the covered agreements.” It is further reinforced by the statement in Art. 3.7 that “the aim of the dispute settlement mechanism is to secure a *positive* solution to a dispute.” What “positive” means in the context is unclear, but its traditional connotation as something affirmative suggests that the outcome is not only “mutually acceptable to the parties” in the manner of a win-win solution, but also that it “develop[s] and strengthen[s] relationships among those involved.” Note also the wording of DSU Art. 3.5, which specifies that all solutions to matters raised in dispute settlement are not to “nullify or impair benefits accruing to *any* Member”, thereby emphasizing the idea that solutions must be broadly acceptable and beneficial to the *entire* WTO membership.

has grand-fathered certain MFA derived rights regarding import restrictions for specific Members and Articles XII, XIX, XX and XXI of GATT authorize Members, in specific situations, to make use of special trade measures. We consider that, even if the formation of a customs union may be the occasion for the constituent member(s) to adopt, to the greatest extent possible, similar policies, the specific circumstances which serve as the legal basis for one Member's exercise of such a specific right cannot suddenly be considered to exist for the other constituent members.<sup>53</sup>

The panel's comments suggest an important distinction between law in the two modes. This is that WTO law as a law of rights is much less cohesive than WTO law as a law of obligations. A reality for one country will not be the same reality for every other country. Consequently, WTO law in this second mode is made up of a range of apparently unconnected rights arising in different circumstances that do not map exactly onto the existing treaty structure. Their variability makes them more difficult to discern.

Rights under the WTO Agreement are further diminished by their conditionality. The right might be the right of a country to take anti-dumping or countervailing duty action. Most often the issue in dispute settlement is whether the conditions precedent to an exercise of that right - such as a properly conducted investigation - have been fulfilled.

These aspects of the law were highlighted in *Argentina – Footwear Safeguard*.<sup>54</sup> In that case the issue was whether Argentina had met requirements to impose safeguards on imports of footwear from the EC. The Appellate Body observed:

... it must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of the GATT 1994, which are fundamental to the *WTO Agreement*. As such, safeguard measures may be applied only when *all* the provisions of the *Agreement on Safeguards* and Article XIX of the GATT 1994 are clearly demonstrated.<sup>55</sup>

The Appellate Body's comments in *Argentina – Footwear Safeguard* also demonstrate another feature of reality-based disciplines: the insistence on a “clear showing”.<sup>56</sup> This is particularly

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<sup>53</sup> *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/R, para. 9.184 (May 31, 1999) [emphasis added].

<sup>54</sup> *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (14 Dec. 1999).

<sup>55</sup> *Ibid.*, para. 95 (Dec. 14, 1999).

<sup>56</sup> See for example *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, para. 162-164 (Jan. 10, 2001) (“determination of whether a measure determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.”). Evidentiary obligations can also be found in ADA Arts. 3.4 (impact examination to include an evaluation of all relevant economic factors and indices”), 3.5 (causal relationship determination “shall be based on an examination of all relevant evidence before the authority”), Annex II (determinations permissible on the basis of facts available), 5.3, 5.8 and 6 (accuracy and adequacy of evidence, and opportunity to present), 10.7 (sufficiency of

true where the right is exercised provisionally or anticipatorily.<sup>57</sup> The exact requirements to satisfy such a need will vary according to the discipline involved and the particular circumstances of each case.<sup>58</sup>

The requirement of evidence is linked to the law's aspect in this mode as contractual and justice's aspect as *corrective*, that is, as seeking to repair harm done. We can easily see how the exercise of a right by one country could give rise to a claim for reparation by another country, a possibility contemplated in the remedy of negotiated compensation under DSU Art. 22.2.<sup>59</sup>

A further feature serving to limit rights under the WTO Agreement is their mutuality. WTO law as a law of rights cannot be exercised in such a way as to eviscerate the rights of other WTO members, a doctrine known as abuse of rights (*abus de droit*).<sup>60</sup> This point was made in *U.S. – Shrimp* where the issue was the right of the U.S. to invoke the exception in GATT Art. XX(g) involving conservation measures.<sup>61</sup> The U.S. raised the exception as a defence to its violation of GATT Art. XI:1, the prohibition on quantitative restrictions, since the U.S. legislation in question effectively prohibited the importation of shrimp that was not caught in a “turtle-friendly” manner.

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evidence) and 11.2 (evidence required for revocation). See also *US – Softwood Lumber*, B.I.S.D. 40<sup>th</sup> Supp. 358, para. 332; *US – DRAM*, para. 6.43; *Mexico - HFCS*, para. 7.97, *Guatemala – Cement I*, para. 7.77; *US – Hot Rolled Steel*, para. 7.153; SCM Arts. 4.2, 11 and 12, CVA Art. 8.3, and Annex 1; SPS Art. 3.3 (scientific justification) and *EC – Hormones*, para. 184; PSA Art. 2.2 (evidentiary standards for price verifications); DSU Art. 26.1 (detailed justification in support of non-violation claims).

<sup>57</sup> See for example Safeguards Agreement Art. 6 (provisional safeguard possible “in critical circumstances” and pursuant to a preliminary determination based on “clear evidence”), Subsidies Agreement Art. 17.1(b) (provisional measures possible where preliminary affirmative determination that “subsidy exists and that there is injury to a domestic industry”) and Antidumping Agreement Art. 7.1(ii) (provisional measures possible where preliminary affirmative determination of “dumping and consequent injury to a domestic industry”). See also the standard for threatened injury: SAF Art. 4.2(a), SCM Arts. 15.7-8; AD Art. 3.7. In this respect see also *U.S. – Lamb Safeguards*, WT/DS177,178/AB/R, para. 125 (May 1, 2001) (where in interpreting the phrase “threat of serious injury” the Appellate Body emphasized the phrase “clearly imminent” which it considered to mean “that there must be a high degree of likelihood that the anticipated serious *injury* will materialize in the very near future.”).

<sup>58</sup> This has led to concern recently about fact-finding ability in WTO dispute settlement. See Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience*, 26 FORDHAM INT'L L.J. 1505, 1542 (2003) (observing that “[d]espite the extensive right to seek information of every panel, it is generally believed that the investigation of facts is among the weakest spots of the panel procedure.”). Petros Mavroidis, *Essay: Dispute Settlement Procedures and Mechanisms* 16 ARIZ. J. INT'L & COMP. L. 225, 258 (1999) (“The WTO has been criticized ... for its fact-finding defects ...”).

<sup>59</sup> “If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance ... such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.” As of early 2007 compensation had only been negotiated in one case under the WTO DSU, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000). For commentary see Bernard O'Connor & Margareta Djordjevic, *Practical Aspects of Monetary Compensation: The U.S. Copyright Case* 8:1 J. INT'L ECON. L. 127 (2005).

<sup>60</sup> Reference to the doctrine can be found in *United States – Shrimp*, WT/DS58/AB/R, para. 152 (Oct. 12, 1998). It is traditionally a doctrine of the civil law. Its application in international law is discussed in IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY – PART I* 52 (1983).

<sup>61</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

The Appellate Body agreed that the U.S. had met the terms of the exception, but then went on to analyze whether it had fulfilled the conditions of the preamble, or “chapeau”, of Art. XX.<sup>62</sup> In doing so the Appellate Body observed:

Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.<sup>63</sup>

A like observation was made in *U.S. – Line Pipe Safeguards*, where the dispute involved the U.S.'s right to impose safeguards against imports of certain steel pipe from Korea. The Appellate Body observed:

There is, therefore, a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against "fair trade" beyond what is necessary to provide extraordinary and temporary relief. A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing trade concessions. The balance struck by the WTO Members in reconciling this natural tension relating to

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<sup>62</sup> The preamble to GATT Art. XX provides that “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... ” the limited nature of exceptions (versus the plenary nature of obligations)

<sup>63</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 156 (Oct. 12, 1998) (emphasis in original).

safeguard measures is found in the provisions of the *Agreement on Safeguards*.<sup>64</sup>

The Appellate Body's statements in *U.S. – Shrimp* and *U.S. – Line Pipe Safeguards* illustrate the fact that the WTO Agreement as a law of rights involves action that is highly conditioned and contextualized, and that exists within a larger matrix of correlative rights *and* obligations.

*c. Promoting Interdependence: A Regime of Lex Specialis*

The division of WTO law into a law of obligations and a law of rights is attractive since it emphasizes both the regime's legality (i.e. as an order of rights and obligations) and its integrity (i.e. as a network of obligations countered by rights). At the same time, the theory's unity implies that there is something else arising from the interaction of its parts, something which only becomes apparent across time. This is the idea of WTO law as a regime of *lex specialis*.

The term *lex specialis* has no fixed meaning in international law.<sup>65</sup> We can take from its Latin roots, however, that it is a 'special' or 'exceptional' body of law distinct from the law that which is regularly applied. The extent of displacement will be determined by the *lex specialis*.<sup>66</sup> Some idea of the special character of this regime comes by comparing WTO obligations with those typically identified under international law.

The International Law Commission's Articles on State Responsibility suggest that in the typical bilateral relationship rights are linked to corresponding obligations. Thus, ASR Art. 2(1) provides that a country's wrongful act imposes upon it an *obligation* of state responsibility. ASR Art. 42(a) further specifies that this obligation is owed in the first place to the "injured state", the injured state being defined as "the State whose *individual right* has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act."<sup>67</sup> ASR Art. 42(b) also goes on to specify that the obligation may be owed to the international community as a whole, or to a subset thereof, and Art. 48 contemplates that responsibility may be invoked by a state *other than an injured state* provided that the obligation is owed to a group of states and is established for the group's collective interest, or is an obligation owed to the international community as a whole.

The dominant impression left by the ASR's arrangement is therefore that obligations under international law are of two types: either bilateral *or* collective, not both. Yet if we look carefully at the WTO Agreement, obligations have a dual quality. To be sure, MFN operates to presumptively multilateralize all obligations under the treaty. Nevertheless, there remain

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<sup>64</sup> *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, para. 83 (Feb. 15, 2002) (emphasis in original).

<sup>65</sup> See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 96 (1984). For identification of the WTO Agreement as *lex specialis* see *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* 39 (2004); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 E.J.I.L. (2002) 753

<sup>66</sup> "It will depend on the special rule to establish the extent to which the more general rules on State responsibility ... are displaced ...". JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 307 (2002).

<sup>67</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 254 (2002).

significant bilateralizing tendencies that work to counter the idea of it as purely collective. From this comes the idea of substantive intermediacy consistent with *lex specialis*.

For instance, a purely collective arrangement would allow *any* country that is a member to contest a breach since the fundamental interest at stake belongs to *all*, yet the WTO Agreement does not do this. Instead, it requires individual countries to launch claims and only permits them to retaliate where they have actual trade with the defendant.<sup>68</sup> Likewise, countries invoking third party status in dispute settlement are required to show a “substantial interest”.<sup>69</sup> More generally, the Appellate Body has made references to “countries *concerned*”, a phrase which suggests that there are issues of concern within the treaty that extend to some, but not necessarily all, WTO members.<sup>70</sup>

This intermediacy can be understood by referring to the ASR and its accompanying Commentary. ASR Art. 33(1) provides that obligations “may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.” The Commentary goes on to clarify that the scope of the obligation is dictated both by the *nature* of the primary rule and the *situation* encountered in its breach. Thus, it is entirely conceivable that WTO obligations might have an ambient character and be, strictly speaking, neither purely bilateral nor wholly collective but rather some combination of the two. Indeed, they may demonstrate different aspects in different conditions.

What then does WTO law as a regime of *lex specialis* amount to? The overarching purpose of WTO law is the promotion of interdependence. This comes about as a result of the interaction of rights and obligations and is apparent in two respects: one is the way in which national bureaucracies *function*, the other is the way in which economic operators *think*. In both cases, the treaty creates a new situation.

A “new situation” is a catchall phrase employed in law to denote a paradigmatic shift. The shift occurs because national bureaucrats are more likely to take account of international law and to consult, or at least to advert to, international standards, while economic operators are more likely to look for trading partners that offer the most attractive terms regardless of nationality. The result is greater interdependence, an interdependence envisaged in the U.N. Charter’s guarantee of “international peace and security”.<sup>71</sup>

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<sup>68</sup> “... a [WTO] Member’s legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU.” *EC – Bananas III* (Art. 22.6), WT/DS27/ARB, para. 6.10 (April 9, 1999).

<sup>69</sup> Chi Carmody, *Of Substantial Interest: Third Parties under GATT*, 18 MICH. J. INT’L L. 615 (1997).

<sup>70</sup> *European Communities – Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, para. 7.125 (Mar. 7, 2003). *United States – Shrimp*, WT/DS58/R, para. 7.55 (May 15, 1998).

<sup>71</sup> The phrase “international peace and security” is found in the Preamble and Art. 1(1) of the U.N. Charter. It has been analyzed as follows: “If ‘peace’ is narrowly defined as the mere absence of a threat or use of force against the territorial integrity of political independence of any State ... the term ‘security’ will contain parts of what is usually referred to as the notion of ‘positive peace’ ... generally understood as encompassing the activity which is necessary for the maintaining of conditions of peace.” Rüdiger Wolfrum, in BRUNO SIMMA (ed.), *THE UNITED NATIONS CHARTER: A COMMENTARY* 41 (2002)

One notable example of this interdependence is embodied in the WTO Declaration on TRIPS and Public Health. The Declaration was something arrived at gradually through efforts in many fora, even though in its final form it took the shape of a pronouncement by the WTO membership in November 2001. Outwardly, the Declaration would appear to confirm an event-driven, interstitial view of the treaty, or in other words, a sort of “big bang” theory about WTO law. Reality, however, is different.

Haochen Sun has done a masterful job of tracing the transformation at work in the drafting and adoption of the Declaration.<sup>72</sup> He illustrates how a number of countries and non-governmental organizations were concerned about the hard-line approach to pharmaceutical patent protection in *India – Patent Protection*<sup>73</sup> and sought to recast the issue of compulsory licencing as one of human rights by discussing it in the World Intellectual Property Organization, the Office of the U.N. High Commission for Human Rights, the U.N. Sub-Commission on Human Rights, the World Health Organization and its Assembly, and the U.N. General Assembly in Special Session.<sup>74</sup> These discussions had the desired effect. Each body adopted statements broadly supportive of a country’s right to compulsorily licence in order to protect public health.

Sun also details how litigation launched by the branded pharmaceutical companies in South Africa in 1998 and by the United States against Brazil in the WTO in February 2001 effectively backfired because it depicted the branded pharmaceutical companies as profit-driven and the global public in many developing countries as denied the right to human health.<sup>75</sup> These perceptions were confirmed by the apparently self-interested behaviour of certain developed countries in response to an anthrax scare in the fall of 2001.<sup>76</sup>

The outcome of these events was a certain “ripening” of the compulsory licencing issue internationally. A new balance embodying the emerging global consensus was ready to be struck. The WTO Declaration of November 2001 did so by acknowledging that “intellectual property protection is important for the development of new medicines” and also confirming that “the TRIPS Agreement does not and should not prevent [WTO] Members from taking measures to protect public health.”<sup>77</sup> Proceeding from these principles, the Declaration recognized that the flexibility inherent in the TRIPS Agreement allows each member “the *right* to grant compulsory licences and the freedom to determine the grounds on which such licences are granted.” The Declaration likewise recognized that “[e]ach Member has the *right* to determine what constitutes a national emergency or other circumstances of extreme urgency”, specifically mentioning “those relating to HIV/AIDS, tuberculosis, malaria and other epidemics ...”.

The Doha Declaration on TRIPS and Public Health was able to resolve many questions at once in a far more comprehensive manner than the typical result in WTO dispute settlement. It possessed the added advantage of being interpretative in nature and therefore not necessarily

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<sup>72</sup> Haochen Sun, *The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health*, 15 EUR. J. INT’L L. 123 (Feb. 2004).

<sup>73</sup> WT/DS50/AB/R (19 Dec. 1997).

<sup>74</sup> Haochen Sun, *The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health*, 15 EUR. J. INT’L L. 123, 127-32 (Feb. 2004).

<sup>75</sup> *Ibid.*, 132-133.

<sup>76</sup> *Ibid.*, 133-134.

<sup>77</sup> *WTO Declaration on TRIPS and Public Health*, WT/MIN(01)/DEC/2 (20 Nov. 2001).

requiring immediate action on implementation. However, one issue that it did not resolve was identified in paragraph 6:

We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licences under the TRIPS Agreement.

The Declaration therefore instructed “the [WTO] Council for TRIPS to find an expeditious solution to this problem and report to the General Council before the end of 2002.”

This statement provided impetus for negotiation and agreement on the Decision on the Implementation of Paragraph 6 of the Doha Declaration in August 2003.<sup>78</sup> The Decision solves the problem of exporting compulsorily licenced pharmaceuticals to countries with little pharmaceutical manufacturing capacity by waiving the requirement in TRIPS Art. 31(f) that “any such use shall be authorized *predominately for the domestic market of the Member authorizing such use.*”<sup>79</sup> The Decision effectively allows – but does not require – countries to identify whether they will be eligible “importing Members”, that is, whether they will use the system established by the Decision to import compulsorily licenced pharmaceuticals, and in parallel, whether they wish to be designated as “exporting Members” to produce pharmaceuticals for, and export to, eligible importing WTO members.

What is striking about both the Declaration and the Decision in light of what we have already seen is the way in which they are documents about the arrangement of *rights and obligations*. Importing countries are obliged to notify the WTO TRIPS Council of the quantities of the products needed, to confirm an insufficient manufacturing capacity for the products in question, and then proceed to grant compulsory licences. Exporting countries are likewise obliged to issue compulsory licences, to indicate how much product is being produced, to ensure distinctive packaging, and so forth.

The reciprocal obligations set out in the Decision - and the rights they infer - are fundamentally about the way in which countries will work together, a key feature of *transformative justice*. Transformative justice does not presume wrongdoing. Instead, it aims to resolve conflicts of interest through the exploration of options and the formulation of acceptable responses. A key attribute of justice in this mode is that it seeks to develop and strengthen relationships among those involved.<sup>80</sup> In the case of the Decision this is further emphasized by overarching obligations of technical and financial cooperation to prevent the re-exportation of compulsorily licenced products, to develop systems of regional patents, and to “cooperate in paying special attention to the transfer of technology and capacity-building in the pharmaceutical sector.”<sup>81</sup>

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<sup>78</sup> *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (2 Sept. 2003).

<sup>79</sup> The Decision also waives TRIPS Art. 31(h) which provides that in securing a compulsory licence for a patented product “the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization.”

<sup>80</sup> *Law Commission of Canada, From Restorative Justice to Transformative Justice: Discussion Paper*, Law Commission of Canada Catalogue No. JL2-6/1999 (1999).

<sup>81</sup> *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540, Art. 7 (2 Sept. 2003).

The Decision is a useful example of what the interaction of rights and obligations under the WTO Agreement can produce. At the same time, it is not problem-free. To recall the Appellate Body's statement in *U.S. – Shrimp*, “[t]he location of the line of equilibrium ... is not fixed and unchanging.” This suggests that the balance struck in documents like the Decision is fluid and may, or may not, be broadly acceptable depending upon the ability to reflect the deeper moral sense of what is necessary. In the aftermath of the Decision, for instance, there continues to be skirmishing over compulsory licencing apparent in the way that countries have implemented the Decision and the lack of notifications received from importing countries so far.<sup>82</sup>

#### 4. THE IDEA OF A SYSTEM

The description I have offered of a theory of WTO law is just that: a description. It sets forth the principal elements of WTO law and explains how they operate together. To that extent it details what the law *is*. Nevertheless, such an introductory account falls short because it fails to fully convey the richness of the observed interaction. A theory of WTO law reveals that the law operates on many planes at once. Consequently, we need something more.

That “more” is the idea of WTO law as a system. A system is “a group or set of things that together form a unity.”<sup>83</sup> Their common feature is their relationship to one another. The relationship may take the form of correspondence, as in symmetry, or conditionality, as in a sequence, or it may take no regular form at all but rather subsist in the link to a general connecting feature such as a constitution.

A legal system is therefore distinct. It will possess a degree of autonomy from the general body of law and will often incorporate independent means of adjusting internal tensions or adapting to external change.

In positive law the idea of a system was developed by Kelsen, who understood it primarily in terms of the law's effectiveness.<sup>84</sup> According to Kelsen a system of law is arranged according to a *Grundnorm*, or basic law, from which all other law flows. Other commentators, such as H.L.A. Hart, have tended to emphasize the legal system's internal arrangement. A legal system is composed of both primary and secondary rules. Primary rules are those rules that determine what

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<sup>82</sup> In mid-2006 a number of NGOs criticized the U.S. for allegedly seeking to undermine the “Paragraph 6” system through the conclusion of bilateral and regional free trade deals. In November 2006 the European Parliament adopted a joint resolution with the European Commission referring to the system and calling for the need “to abolish the complex, time consuming procedural steps needed for authorisation of compulsory licenses.” *MEPS Call for Increased Funding for Global Health Fund*, U.S. FEDERAL NEWS (Nov. 30, 2006). At the end of 2006 there were no notifications to the WTO under the “Paragraph 6” system, although news reports indicated that Thailand was preparing to invoke it to produce efavirenz, an anti-retroviral: *PHRMA Criticizes Thailand Compulsory Licence for HIV/AIDS Drug*, INSIDE U.S. TRADE (Dec. 8, 2006).

<sup>83</sup> THE NEW SHORTER OXFORD DICTIONARY 3157 (5<sup>th</sup> ed.) (2002). The term “system” has been defined by W. Edwards Deming as follows: “What is a system? A system is a network of interdependent components that work together to try to accomplish the aim of the system. A system must have an aim. Without an aim, there is no system. The aim of the system must be clear to everyone in the system. The aim must include plans for the future. The aim is a value judgement.” W. EDWARDS DEMING, THE NEW ECONOMICS FOR INDUSTRY, GOVERNMENT, EDUCATION 3 (2<sup>nd</sup> ed.) (1993).

<sup>84</sup> HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1949).

the rules of the system are; secondary rules are those rules that create legal obligations for the subjects of the law.<sup>85</sup>

Kelsen's work is traditionally distinguished from Hart's in that the former saw the *Grundnorm* as a matter of logical necessity whereas the latter regarded primary rules as a question of fact. Still, both Kelsen and Hart were concerned with the question of a system in domestic law. Issues of systemic unity were not so pressing to them because domestic law has sovereign limits.

In international law the idea of a system – or more precisely, the idea of a *subsystem* within the larger system of international law – is less well defined but has been present for some time. Treaties of alliance are an evident example. They impose differential obligations upon groups of countries in their relations *inter se*. Nevertheless, how different a subsystem will be from the broader body of international law is probably a matter of degree. As James Crawford has observed, “there cannot be, at the international level, any truly self-contained regime, hermetically sealed against bad weather.”<sup>86</sup>

The term “system” in relation to the WTO Agreement is commonplace yet also something of a mystery.<sup>87</sup> Ernst-Ulrich Petersmann's observation in 1983 about GATT that “the precise meaning of the postulated ‘system’ is seldom defined”<sup>88</sup> could just as easily be made about the WTO Agreement today. A theory of WTO law yields no clear answer. Instead, it suggests that law is an activity and the legal system is the product of “sustained purposive effort.”<sup>89</sup>

Two further propositions follow. One is that law and the function of a legal system are creative activities formed, as seen, “through the continuing struggles of social practice ... and do[] not result from any pre-established system of normative hierarchy.”<sup>90</sup> A second point is “that law cannot be understood as a fully realized system sprung full-born from the head of a sovereign, or bequeathed intact from the implicit terms of a social contract. Law can exist by degrees ....”<sup>91</sup> Thus, the “continuum of legality can make it difficult to know exactly when a system, or a particular rule, has made the transition from social to legal normativity.”<sup>92</sup> At the same time,

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<sup>85</sup> H.L.A. HART, *THE CONCEPT OF LAW* (2<sup>nd</sup> ed.) 110-117 (1994).

<sup>86</sup> Daniel Bodansky, John Crook & James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 880 (2002).

<sup>87</sup> See *Canada – Autos*, WT/DS139/AB/R, para. 69 (June 19, 2000); *United States – Section 211 Appropriations Act*, WT/DS176/AB/R para. 297 (Feb. 1, 2002).

<sup>88</sup> Ernst-Ulrich Petersmann, *International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order* in R. ST.J. MACDONALD & D.M. JOHNSTON (eds), *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 227, 234 (1983).

<sup>89</sup> Some idea of the successive articulation of GATT/WTO law in dispute settlement and then negotiation (and potentially back again) is given by John M. Weekes, *The External Dynamics of the Dispute Settlement Understanding: Its Impact on Trade Relations and Trade Negotiations – An Initial Analysis* (2004) (on file with author). Ralph Fischer has also speculated that “WTO-plus” coverage in the field of intellectual property is best sought through bilateral agreement: Ralph Fischer, *The Expansion of Intellectual Property Rights by International Agreement*, 28 LOY. L.A. INT'L & COMP. L. REV. 129 (2006). See also generally STEVEN WOOLCOCK (ed.), *MULTILATERALISM IN NEUTRAL: THE INTERACTION BETWEEN LEVELS OF RULEMAKING IN INTERNATIONAL TRADE AND INVESTMENT* (2006).

<sup>90</sup> Jutta Brunnée and Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, COLUM. J. TRANSNAT'L L. 19, 47 (2000).

<sup>91</sup> *Ibid.*, p. 47.

<sup>92</sup> *Ibid.*, p. 47-48.

insights gleaned from a theory of WTO law can help us to understand how the treaty might constitute a relatively self-sufficient whole.

I have already noted that WTO obligations are a hybrid. They are partly concessionary, that is, the subject of reciprocal exchange, but also partly absolute. Their concessionary character is most apparent at the stage of negotiation. It is replaced by relatively uniform obligations when the treaty enters into operation.

This double aspect has consequences. Notwithstanding the general requirement to observe WTO obligations at all times, it creates a subsisting tension that is more likely to make the treaty work. In essence, interdependence stresses the need for countries to comply because it subtly reminds them of what they will lose if they do not.

Substantive dualism finds its clearest expression in the idea of the treaty as a “balance”. Mention is often made of the notion of balance in WTO law, something which naturally arises out of the WTO Agreement’s origins as a package of concessions.<sup>93</sup> In this, breaches are problematized as imbalances, meaning that in most cases a country will need to amend or withdraw the impugned measure in order to right the balance. Such bivalence manifests itself both in the ability to depart from the equilibrium and in insistence on re-establishing it. A dynamic is therefore present in the treaty that serves as a form of systemic momentum, or *vis vitae*.

An important part of the momentum is provided by the fact of a *plural* membership having to conform with a *single* set of obligations. WTO obligations are to be complied with absolutely, co-ordinately and concurrently, thereby giving them a certain force.

In *Brazil – Desiccated Coconut*, for example, the Philippines challenged a countervailing duty investigation by Brazilian authorities into imports of Philippine coconut.<sup>94</sup> The investigation began in June 1994 at a time of transition between GATT and WTO rules. The Philippines challenged whether the Brazilian investigation was to be analyzed under GATT Art. VI and either the GATT SCM Agreement or the new, more onerous WTO SCM Agreement.

In the course of its decision the Appellate Body observed:

Article VI of GATT 1947 and the Tokyo Round SCM Code represent, as among Code signatories, a package of rights and obligations regarding the use of countervailing measures, and Article VI of GATT 1994 and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. Thus, Article VI and the respective SCM Agreements impose obligations on a potential user of

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<sup>93</sup> See for instance *U.S. – Underwear*, WT/DS24/AB/R, p. 15 (Feb. 25, 1997) (referring to ATC Art. 6 as reflecting “carefully negotiated language ... which reflects an equally carefully drawn *balance* of rights and obligations of Members ... .”); *U.S. – Hot-Rolled Steel*, WT/DS184/AB/R, para. 102 (July 24, 2001) (“We, therefore, see paragraphs 2 and 5 of Annexes II of the Anti-Dumping Agreement as reflecting a careful *balance* between the interests of investigating authorities and exporters.”); *Brazil – Aircraft*, WT/DS46/AB/R, para. 139 (Aug. 2, 1999) (“paragraphs 2 and 4 of Article 27 contain a carefully negotiated *balance* of rights and obligations for developing country Members.”).

<sup>94</sup> *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R (Oct. 17, 1996).

countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied.<sup>95</sup>

The Appellate Body went on to comment:

The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures.<sup>96</sup>

What is noteworthy is the way in which the Appellate Body conceived of the relevant obligations as cumulative, and the way in which it tied them together as a “*package of rights and obligations*.” It confirmed its understanding by referring to the WTO Agreement as “an integrated *system*”.<sup>97</sup>

Notwithstanding these observations, the great mass of WTO obligations makes some kind of more regular ordering of the law a necessity. This is accomplished in three ways. First, the WTO Agreement contains rules defining the internal hierarchy of norms. Thus, for instance, the Interpretative Note to Annex 1A of the WTO Agreement provides that a conflict between a provision of GATT and the WTO SCM Agreement is to be resolved in favour of the WTO SCM Agreement. Second, the WTO Agreement also contains certain rules about its interaction with other systems of law. Article XVI:3 of the WTO Agreement, for instance, requires that WTO member countries bring their laws, regulations and administrative practices into conformity with the treaty.

Even so, how the law is made consistent with the WTO Agreement is not always clear. Thus, a third mechanism, dispute settlement, is resorted to in order to maintain the treaty’s systemic coherence.<sup>98</sup> Dispute settlement functions to supply a response where the treaty is unclear or silent. In the process it helps to demarcate the system’s boundaries.

The importance of dispute settlement was noted in *U.S. – Section 301*:

... the relevance of Article 23 obligations for individuals and the market-place is particularly important since they radiate on to all substantive obligations under the WTO. If individual economic operators cannot be confident about the integrity of WTO dispute resolution and may fear unilateral measures outside the guarantees and disciplines which the DSU ensures, their confidence in each and every of the substantive disciplines of the system will be undermined as well. The overall

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<sup>95</sup> Ibid., para. 246.

<sup>96</sup> Ibid.

<sup>97</sup> WT/DS22/AB/R, p. 11 (Feb. 21, 1997) [emphasis added]. On this basis it determined that the applicable set of rules was governed by the commencement date of the investigation which, in the instant case, fell within the period of GATT and the GATT SCM Code, something which led to dismissal of the Philippine complaint. See also *U.S. – 1916 Act*, WT/DS136/R, para. 6.97 (Aug. 28, 2000).

<sup>98</sup> *Indonesia – Autos*, WT/DS54/R, para. 14.28 (July 2, 1998).

systemic damage and the denial of benefits would be amplified accordingly. The assurances thus given under the DSU may, in our view, be of even greater importance than those provided under substantive WTO provisions. For that reason, the preservation of the specific guarantees provided for in Article 23 is of added importance given the spill-over effect they have on all material WTO rights and obligations.<sup>99</sup>

There are, nevertheless, discernible limits as to how far dispute settlement can go in reinforcing the system's integrity. One is the role of dispute settlement. Panels and the Appellate Body are generally limited to making an "objective assessment" of the claims and arguments put before them.<sup>100</sup> Another is the substantive extent of panels' and the Appellate Body's jurisdiction. This is limited to obligations assumed under the WTO Agreement.<sup>101</sup> Finally there is the domestic jurisdiction of WTO member countries. Both panels and the Appellate Body have stressed the residual freedom that countries maintain in acceding to the treaty.<sup>102</sup>

## 5. A THEORY OF WTO LAW AND INTERNATIONAL LAW

The fact of a theory of WTO law raises the question whether the theory says anything about public international law. Put in another way, can we identify the same alignments and tendencies in that broader body of law as well?

This is a significant question, and any answer to it can only be derived by considering the nature of international law. This article has focused on the arrangement of rights and obligations under the WTO Agreement, and to the extent that rights and obligations are a common feature of any legal system, we should expect some commonality between the two systems. What immediately distinguishes systems, however, is the shape of their respective landscapes, by which I mean the topography of the law and the range of possible interactions upon it.

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<sup>99</sup> *U.S. - Section 301*, para. 7.94.

<sup>100</sup> DSU Art. 11 ("... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...")

<sup>101</sup> In *India - Quantitative Restrictions*, WT/DS90/AB/R, para. 84 (23 Aug. 1999), the Appellate Body defined the ambit of dispute settlement as follows: "According to [GATT] Article XXIII, any Member which considers that a benefit accruing to it directly or indirectly under the GATT 1994 is being nullified or impaired as a result of the failure of another Member to carry out its obligations, may resort to the dispute settlement procedures of Art. XXIII." See also the discussion of WTO dispute settlement jurisdiction in *Mexico - Soft Drinks*, WT/DS308/AB/R, para. 56 (Mar. 6, 2006).

<sup>102</sup> *U.S. - Shrimp*, WT/DS58/AB/R, para. 187 (Oct. 12, 1998) ("WTO Members are free to pursue their own policies aimed at protecting the environment as long as, in doing so, they fulfill their obligations and respect the rights of other Members under the WTO Agreement"); *U.S. - FSC*, WT/DS108/R, para. 7.122 (8 Oct. 1999) (discussing policy freedom in the field of taxation); *U.S. - Cotton Subsidies*, WT/DS267/AB/R, para. 619 ("Members are free to grant as much food aid as they wish, provided that they do so consistently with ADA Art. 10.1 and 10.4").

The landscape of WTO law is relatively plain and undifferentiated. Member countries assume rights and obligations in a pattern that emphasizes obligations as opposed to rights. This pattern, moreover, applies among *states*. It is not something that regularly involves non-state actors.<sup>103</sup>

In international law, by comparison, a state may incur a variety of obligations to different interests. To recall, it may assume obligations that are bilateral or collectively owed to other states, but it may also owe those obligations to individuals, groups and affiliations. For the same reason, the neat oppositions and symmetries so apparent in WTO law are harder to discern. International law is less dense and more irregular. As James Crawford has observed, “what has emerged has not been a code, or even chapters of a code, so much as sets of substantive rules adapted to particular fields.”<sup>104</sup> Consequently, the point about WTO law as both a law of expectations and a law of realities may manifest itself in international law, but not with the same systemic intensity. The diversity of interests involved does not aim towards the same singular goal – interdependence – that WTO law does. Different regimes under international law seek to protect different interests. Some seek to promote human rights, others the survival of a species, and still others the protection of cultural heritage.

Nevertheless, as a general matter the distinction between expectations and realities in WTO law *is* alive in the distinction made in public international law between conventional and customary obligations. Article 38.1(a) of the Statute of the International Court of Justice refers to international treaties as a source of law, and is traditionally matched with “international custom, as evidence of a general practice accepted as law” in Art. 38.1(b).<sup>105</sup> What we see from this pairing is that custom serves to adjust idealized norms to the pattern of practice.<sup>106</sup> Consequently, international law avoids what Charles de Visscher referred to as “[t]he temptation to formalism”.<sup>107</sup> In the same way too, the fundamental dialectic between national and international reappears and dialogue proceeds, even if that dialogue happens in a much less automatic way.

A further parallel between a theory of WTO law and international law is to be found in the nature of justice. As seen, WTO law prescribes distributive justice, a form of justice concerned with re-establishment of the applicable distribution. In this respect, it is significant that ASR Art. 30(a) identifies the remedial obligation of a state responsible for a wrongful act as being “to *cease* that act, if it is of a continuing character” and the accompanying commentary refers to cessation as “the *first* requirement in eliminating the consequences of wrongful conduct.”<sup>108</sup> The explanation

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<sup>103</sup> A reflection of this is the fact that access to WTO dispute settlement is reserved to states alone: *U.S. – Shrimp*, para. 101. WT/DS58/AB/R (12 Oct. 1998). It has definite consequences of the nature of WTO law: JEFFREY WAICYMER, *WTO LITIGATION* 3 (2002).

<sup>104</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 15 (2002).

<sup>105</sup> 59 Stat. 1031; U.S.T.S. 993; 39 AJIL Supp. 215 (1945).

<sup>106</sup> This point is particularly apparent in the rules that govern the interaction of convention and customary law. Custom (i.e. realities) prevails over convention (i.e. expectations) to the extent that custom moves away from the conventionally expressed norm. For a discussion see Sheila Weinberger, *The Wimbledon Paradox and the World Court: Confronting Inevitable Conflicts Between Conventional and Customary International Law*, 10 EMORY INT’L L. REV. 397 (1996).

<sup>107</sup> CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 143 (1968).

<sup>108</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 196 (2002).

for this primacy – a primacy which recalls the primacy of settlement, withdrawal or amendment under the DSU – is given by the ILC as follows:

Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation. It is frequently demanded not only by States but also by the organs of international organizations ....<sup>109</sup>

The reason for this hierarchy is an abiding concern with *expectations* about the integrity of the law:

The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.<sup>110</sup>

As seen, however, distributive justice is not the only kind of justice. Corrective justice is also present to a degree, something which may be found in the obligation listed in ASR Art. 31.1 “to make *full reparation* for the injury caused by the internationally wrongful act.” Again, however, in commenting on the distinction between remedies the ILC has observed:

By contrast reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.<sup>111</sup>

The reason for this observation is knowledge of the dangers of a purely quantitative preoccupation with re-establishing the *status quo*. In many instances under international law it may be impossible to re-establish the *status quo ante* because the fundamental interest at stake is collective expectations, and so what must be hoped for instead is the establishment of a *new status quo* through arrangements acceptable to all, as arguably now happens under the WTO Agreement.

## 6. CONCLUSION

In this article I have put forward a theory of WTO law. It is principally a *legal* theory, that is, a theory based on law and justice. The analysis involves the identification of the fundamental elements of the WTO Agreement and to that extent it answers the central question of analytic jurisprudence: the question of what the law *is*.

The analysis is facilitated by the close correspondence in the WTO system between collective obligations and distributive justice on the one hand, and individual rights and corrective justice on the other. When observed together, the two clusters can be seen to operate reflexively in the

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<sup>109</sup> Ibid., 196-197.

<sup>110</sup> Ibid. 197.

<sup>111</sup> Ibid.

manner of moieties. A “moiety” is a borrowing from the French term *moitié*, or half, and in its standard English meaning is used to suggest the greater whole that the half is a part of.<sup>112</sup>

In anthropology a moiety is defined as “either of two kinship groups based on unilateral descent that together make up a tribe or society.” Each moiety “has a specialized function indispensable to the collectivity as a whole and complementary to the functions assigned to other groups.”<sup>113</sup> Claude Lévi-Strauss has written, for example, about clan moieties among the Aborigines of Northern Australia.<sup>114</sup>

Similarly in this article, I have distinguished between the two dominant forms of legal instrument in WTO law and then constructed a taxonomy in order to illustrate their respective roles. Perhaps the most salient is the distinction between a generalized notion of obligations and a more particularized sense of rights, but there are others. All of them work together however, so that WTO law can be regarded as managing the interplay between the collective and the individual, the international and the domestic. This is where the idea of a system arises, for an important value of theory lies not only in its identification of its contrasting elements, or moieties, but also - and perhaps most critically - *in its explanation of their ongoing interaction*.

Indeed, an important point to be taken away from the analysis is the vital sense of dynamism, or in other words, the idea that the theoretical framework must account for constant movement, and in most instances, growth. The growth in world trade has in fact been substantial recently. As part of its functions the WTO also monitors trade statistics and they generally tell an impressive tale.<sup>115</sup> But it is a mark of the trading system's fluidity that the organization cannot estimate at any given moment what the actual amount of international trade is. There is simply too much happening for precise measurement.<sup>116</sup>

The same indeterminacy is encountered in the field of physics and thermo dynamics where an “equation of state” can be derived to predict the properties of gases and liquids under fixed conditions. The problem with such equations, as scientists have discovered, is that conditions are constantly changing and therefore any equation is only valid for the initial state in which it is derived. Not surprisingly, attempts to derive a single equation to predict the properties of all substances under all conditions have failed.

The scientific analogy should help to clarify why the theory posited here is *not* something reducible to an exact relationship, as in Einstein’s mass-energy equation,  $E = MC^2$ . What I have put forward exists more in the manner of an environment or condition in which many relationships fluctuate *and* inter-relate simultaneously. A parts supplier in Argentina may decide to increase production because its leading customer, a bus manufacturer in Brazil, sees new opportunities for sales due to lower tariffs in Eastern Europe. Multinational chains that source from several countries may expand their presence in Egypt due to the removal of excise taxes on

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<sup>112</sup> “Moiety”, THE OXFORD ENGLISH DICTIONARY 1809 (5<sup>th</sup> ed.) (2002).

<sup>113</sup> CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 113 (1962).

<sup>114</sup> *Ibid.*, 118.

<sup>115</sup> World Trade Organization, INTERNATIONAL TRADE STATISTICS 2006 (2006).

<sup>116</sup> Efforts to do so in the context of the Doha Round have at best yielded results that are only “an approximation”: Alan Beattie et al., *Bid to Pin Down Trade Deal*, THE FINANCIAL TIMES (March 10, 2006).

foreign goods. These examples of interdependence explain the WTO's difficulty in estimating trade.

The ideas presented here can be comfortably quartered in – if not understood as paradigmatic of – *constructivism*, a school of international relations theory which sees law as the mutual *construction* of agent and structure.<sup>117</sup> Drawing on the work of Lon Fuller, constructivists maintain that actor *identities*, rather than *interests*, constitute the core of state behaviour, and that these identities are “shaped and reshaped by action within ... structures.”<sup>118</sup> The “structures constrain social action, but they also enable action, and in turn are affected and potentially altered by the friction of social action against the parameters of the structure.”<sup>119</sup>

Yet even if these ideas are accepted, it is still possible to say so what? How does a theory of WTO law make any difference? Here the answer is that a theory can help to make sense of what we see happening. It allows us to explain, to categorize, and from the resulting arrangement to make connections between the treaty's disparate features. Things fall into place. Order becomes apparent.

Order is important because there is something very slight - almost surreal - about the WTO Agreement. Heavy reliance on indeterminate expectations makes the treaty appear at times like an “emperor with no clothes.” In particular, its emphasis on the abstract recalls various historic epochs – the Amarna Period, Heian Japan, Spain of the Golden Age - when the cultural ethos became fixated upon ideals at the expense of the real. That impression is reinforced by continuing examples of non-compliance, and by the stark fact that at least in the short term, international trade has produced both winners and losers. All of this taken together makes it hard to escape the sense that we are being asked to believe in too much.<sup>120</sup>

Again, however, it is important to consider carefully what the treaty involves to see that its basic arrangement *does* make sense. The real issue is one of balance. Perhaps the most direct confirmation of this point comes from a comparison with the Council for Mutual Economic Assistance (CMEA), the now-defunct economic grouping of the Soviet Union and its socialist trading partners.<sup>121</sup> CMEA trade was negotiated annually among governments and was followed up by inter-enterprise contracts. Total trade was planned. Expectations were therefore fixed.

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<sup>117</sup> “The essential constructivist commitments are to the priority of identity over interest, to the relevance of non-material actor behaviour, to the possibility of “collective intentions” or shared understandings, and to *the mutual construction of agent and structure*.” Jutta Brunnée and Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, COLUM. J. TRANSNAT’L L. 19, 32 (2000). Brunnée and Toope refer to the seminal importance of Lon Fuller’s *THE MORALITY OF LAW* (1964) in constructivist thinking. See *ibid.*, nn. 9, 97.

<sup>118</sup> Jutta Brunnée and Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, COLUM. J. TRANSNAT’L L. 19, 30 (2000).

<sup>119</sup> *Ibid.*

<sup>120</sup> It may be that this thinking takes us to the edge of myth. Much work has been done by anthropologists on the role of myths in societies, and in particular, on the way in which they served to shape a collective consciousness. KAREN ARMSTRONG, *A SHORT HISTORY OF MYTH* (2005). For a recent view of economics as a “faith” see DUNCAN K. FOLEY, *ADAM’S FALLACY: A GUIDE TO ECONOMIC THEOLOGY* (2006).

<sup>121</sup> For reviews of Comecon’s organization and work see J.J. BRINE, *COMECON: THE RISE AND FALL OF AN INTERNATIONAL SOCIALIST ORGANIZATION* (1992). LEE KENDALL METCALF, *THE COUNCIL OF MUTUAL ECONOMIC ASSISTANCE: THE FAILURE OF REFORM* (1997).

Consequently, there was little motivation or incentive to go beyond what had been agreed. Over time such rigidity created problems as world prices, especially for energy, diverged from pre-arranged prices used for CMEA trade.<sup>122</sup> Barter or hard currency transactions became more attractive. The regime failed to adapt to changing conditions and was ultimately disbanded in 1991.

The theory of WTO law suggests that GATT and the WTO Agreement have avoided similar fates because they are based on indeterminate expectations that can readily adjust to the ebb and flow of international trade. In this respect, indeterminacy is not an indication of weakness; it is a sign of strength.

In saying this I do not want to be taken to be describing something perfect. The theory of WTO law conceives of the law's subjects – countries – as fixed in their relations with each other. All countries are formally equal. Still, a critical eye will recognize that the equality of MFN masks great inequality. Some WTO countries are rich, but most are poor. The WTO Agreement can then be accused of consigning the majority of countries to their existing status and not some brighter future. From this perspective, the theory I have posited here starts to look a lot less organic and acceptable and a lot more artificial and objectionable. The central question of normative jurisprudence - that is, what the law *should be* – suddenly, and very forcefully, reasserts itself.<sup>123</sup>

Yet the issue of what law *should be* is a complex one. It cannot be dealt with fully here. My aim in this article has been to set out a general theory of what the law *is* and to explore some of its implications for public international law. My focus originates in dissatisfaction with the state of our current understanding and with the conviction, shared with Lévi-Strauss, that “the greater our knowledge, the more obscure the overall scheme.”<sup>124</sup> One could, of course, be sceptical about the possibility of such a comprehensive explanation, but if all that I have described is simply a coincidence, then it is surely a very great one.

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<sup>122</sup> BRINE, p. 144; KENDALL METCALF, p. 219ff.

<sup>123</sup> “Nor can you rely on any embedded notion of equality to escape the role which the tradition accords you. If no one can create the tradition, no one can escape its teaching and the roles it defines, except by departure (and there may be no place to go). This represents a classic problem that no one, anywhere, has solved. How can a communal form of organization avoid disequilibrium, and inequality, of social role?” H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 67-68 (2000).

<sup>124</sup> CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 89 (1962).